SUPREME COURT OF QUEENSLAND

CITATION:	*Monger v Camwade Pty Ltd* [2011] QSC 97
PARTIES:	**JAI FENTON MONGER** (plaintiff) v **CAMWADE PTY LTD** (defendant)
FILE NO/S:	1266 of 2010
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 May 2011
DELIVERED AT:	Brisbane
HEARING DATE:	1 February 2011
JUDGE:	Martin J
ORDER:	1. **There will be judgment for the plaintiff in the sum of $7,384.80.** 2. **The plaintiff pay the defendant's costs of the proceedings to be assessed on the standard basis from 19 January 2010.** 3. **The assessed costs payable by the plaintiff to the defendant be set off against the amount of the judgment payable by the defendant to the plaintiff.** 4. **Save for any statutory charges in favour of Medicare and Centrelink, enforcement of the judgment against the defendant is stayed pending assessment of the costs payable by the plaintiff to the defendant or until further order.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – where the plaintiff was an employee of the defendant – where the plaintiff suffered an injury to his lower back whilst working for the defendant in lifting a container weighing about 30 kilograms – where defendant has admitted liability – where the plaintiff previously suffered a severe injury to his left leg – where, following the injury, the plaintiff regularly attended a gymnasium for the purposes of exercise – where plaintiff subsequently suffered neck and left shoulder injuries – where

plaintiff did not disclose subsequent injuries in statement of loss and damage or to medical practitioners – where plaintiff was dishonest with medical practitioners in recounting his medical condition –where impairment suffered by plaintiff as a result of the injury is modest –where there is insufficient evidence of any loss suffered in a financial sense – whether the plaintiff is entitled to damages for loss of earning capacity

Bell v Mastermyne Pty Ltd [2008] QSC 331
Nichols v Curtis & Anor [2010] QCA 303

COUNSEL: J P Kimmins for the plaintiff
A S Mellick for the defendant

SOLICITORS: Carew Lawyers for the plaintiff
McInnis Wilson Lawyers Maroochydore the defendant

[1] On 24 October 2008 the plaintiff commenced working for the defendant. On 28 October he lifted a container of pecan nuts weighing about 30 kilograms. In doing so, he suffered an injury to his lower back.

[2] The defendant has admitted liability but there is no agreement as to the extent, if any, of any impairment caused by the injury.

Plaintiff's history before the injury

[3] The plaintiff was born on 19 September 1980. He was 28 at the time of the injury and 30 years old at trial. He completed secondary school but failed every subject in year 12.

[4] When he was 3 years old he suffered a severe injury to his left leg and was required to have about a dozen operations over an 11 year period. He has to wear a specially modified shoe on his left foot.

[5] In 1998 the plaintiff obtained the necessary licence to work as a security guard. He worked for a number of companies doing that type of work. For the 5 years before 2005 he worked on a casual basis. In 2005 his licence was suspended for 10 years when he was convicted of charges involving malicious damage and theft.

[6] Following the loss of his licence the plaintiff claims that he became upset and then engaged in binge drinking. The plaintiff also claimed that he had been molested by a relative at a young age and that this had caused him further problems. These matters, he said, contributed to his difficulty in controlling his anger. There was no evidence, apart from the plaintiff's word, that this molestation had taken place. But that is not unusual for that type of an offence. He has never sought treatment or counselling.

[7] The plaintiff commenced a relationship with his present partner in 2006. They now have two children, one born in February 2008 and the second in February 2009. The plaintiff says that following the birth of those children he felt driven to find a job as soon as possible for his family. He had been receiving money from Centrelink. His

partner was not an Australian citizen and has only received limited government assistance.

[8] In 2007 the plaintiff commenced a Personal Support Program ("the PSP"). He underwent an assessment for this program which is designed for people who have personal difficulties. Members of the program can stay within it for two years subject to certain requirements. During the program it is not necessary for the plaintiff to look for work. The plaintiff, though, did remain registered with Mission Australia so, he says, that he could look for work. The PSP involved talking with various people who would provide counselling and attempt to bring the participants to a position where they can engage more effectively in the community. In a report on his job capacity of March 2007 it is noted that he lacked motivation to enter the workforce and that he had one ambition and that was to become a fitness instructor.

[9] I will return to the actions of the plaintiff prior to commencing employment with the defendant later in these reasons.

Engagement by the defendant

[10] The defendant carried on the business of packaging and the distribution of food products from its premises in Caloundra. The plaintiff had a job interview with Gay Ricketts on 23 October 2008. Mrs Ricketts is a director of the defendant. The plaintiff's case was that Mrs Ricketts told him that the hours he would work would be 38 in a week between the hours of 7:00 in the morning and 4:00 in the afternoon and that he would receive about $600.00 net per week. All of that was denied by Mrs Ricketts. I do not accept any of the plaintiff's evidence with respect to the interview with Mrs Ricketts. There were no other persons engaged by the defendant on anything other than a casual basis. To employ the plaintiff, a person who had been out of the workforce for a long time and who had a lack of any identifiable skills on the basis proposed by the plaintiff, is simply incredible. The entry on the Mission Australia notes recorded that the defendant had decided to commence employing the plaintiff on a trial with the possibility of full time work if successful at trial. Other documents also support the defendant's version of events, including that the plaintiff was paid at the casual rate.

[11] The work that the plaintiff was required to do was the weighing and packaging of food products. He was required, on a regular basis, to lift containers weighing up to 30 kilograms. It was while he was engaging in that action that he suffered the injury of which he complains. He says that he lifted a container and twisted to the left to put it on a shelf. As he did that he felt an immediate onset of severe back pain.

After the injury

[12] On 30 October 2008 the plaintiff lodged a worker's compensation form. On the following day he attended a gymnasium for the purpose of exercise. This was something in which he engaged frequently in the months following the injury.

[13] On 28 November 2008 he told his WorkCover claim manager (Mr Woulahan) that he had not been to a gym for a month. That was untrue. He had already attended the gym 16 times that month.

[14] On 15 December 2008 the plaintiff told Mr Woulahan that he had "not been back at the gym for some time" whereas he had been at the gym as recently as 8.30am that day. He had been at the gym on eight other occasions earlier in that month.

[15] On Christmas Eve 2008 he was arrested for committing a public nuisance and, at the watch house, he committed further offences including assaulting or obstructing a police officer and wilful damage to property.

[16] On 14 April 2009, when the plaintiff's partner was at home with their children, the plaintiff and a friend had been at a nightclub and were returning home in a taxi. For reasons which were not explained, the taxi did not stop at the plaintiff's home but at a location nearby. Both the plaintiff and his friend ran from the taxi, apparently in an attempt to evade payment of the fare. The taxi driver drove after the plaintiff and, it is alleged, knocked the plaintiff down. He suffered neck and left shoulder injuries and completed a CTP notice of accident claim form on 7 September 2009. The injuries which he complains were caused by that incident were not disclosed in his statement of loss and damage. He also failed to disclose those injuries to medical experts, Dr Candle and Dr Labrom. He said that he did not tell them because they did not ask him. I take the view that this was an example of the plaintiff's attempts to provide more prominence to his lower back injury.

[17] In June 2009 the plaintiff was seen by Dr Campbell. He told Dr Campbell that his lower back pain is a daily occurrence and on a scale of one to 10 it rates at 9 in pain. He said that the pain was aggravated by a range of activities including gym work and jogging. As I have noted above, he did not tell Dr Campbell about the shoulder injury, nor did he tell Dr Campbell about neck pain for which he had consulted a general practitioner within the previous fortnight. He had told his general practitioner that he was pain free in the lower back and that he was "not finding the gym aggravating his back too much". He did not tell Dr Campbell that.

[18] In July 2009 the plaintiff was examined by Dr Labrom. This was some five weeks after he had been seen by Dr Campbell. When he saw Dr Labrom he told him that the average pain rating was 3.5 out of 10. Dr Labrom formed the view that the impairment resulting from the lower back injury was modest and that there was no reason to suppose that it would impact adversely upon the plaintiff's ability to qualify as a personal trainer if he was prepared to commit to the necessary study.

[19] I have considered the difference in opinions of Drs Campbell and Labrom and I consider that they arise from the failure by the plaintiff to provide Dr Campbell with an honest recounting of his condition.

[20] At trial the plaintiff said that the consequences of the injury to his left ankle do not play a large part in his current circumstances. He did though in 2005 obviously tell a general practitioner that the ankle injury caused him chronic pain, caused him to limp, and gave him pain when he was standing with the result that the doctor provided a medical certificate containing the opinion that the plaintiff might be retrained into a sitting job with no physical work.

[21] In July 2006 the plaintiff provided a medical certificate which referred to chronic pain in the left ankle. Yet, these were times at which the plaintiff could engage in gym sessions up to three times a day.

[22] On three occasions Centrelink arranged for the plaintiff to undergo work or capacity assessments. At the first, he complained of left ankle pain with activity and consequential spinal problems. After taking into account all that he had said and other relevant matters, the assessor suggested that work that might suit the plaintiff included: cleaner, janitor, hardware sales, car sales, parking attendant, gatekeeper, office work, shop assistant, night filler and gym trainer. There was no evidence that the plaintiff made any application for any such position at any time. There was a note in the assessor's file to the effect that the plaintiff had told him that he (the plaintiff) hates people and that he goes to the gym frequently to stop himself from committing suicide.

[23] A further assessment was undertaken in 2006. He told the assessor that he trained at the gym for several hours a day and was training to become a personal trainer. The assessor told the plaintiff that he could work as a factory worker, process worker, fruit picker, gate keeper or ticket seller. The plaintiff called no evidence that he had applied for any such positions.

[24] In the third assessment, undertaken in 2007, it was recorded that the plaintiff lacked motivation to enter the workforce. His ambition to become a fitness instructor was being thwarted by his inability to pay the fees needed to complete the course. At this assessment he admitted to having a criminal record and expressed feelings of anger at the expectation he should find work. The plaintiff made threats to the assessor and against the job network manager.

[25] The plaintiff was, in my opinion, a witness given to saying whatever he believed would assist his case. He has a history of deceiving medical practitioners, Centrelink personnel and Mission Australia personnel. I do not accept that he was an honest witness. Rather, I find that his history is one consistent with a person who would do whatever was necessary to avoid work and to remain on benefits of some kind. I agree with what was said by McMeekin J in *Bell v Mastermyne Pty Ltd* [2008] QSC 331 at [19]:

> "….The assessment of damages for personal injury depends to a very large extent on a plaintiff's honest reporting - of his or her symptoms; of their impact on the plaintiff's life; of pre-existing problems; of the genuineness of effort to regain employment after injury; and of their capacity to maintain employment. These are all difficult issues for a defendant to thoroughly investigate and test. In truth no-one knows what level of pain an individual experiences and what impact that pain has on any particular plaintiff's capacity to maintain their activities. Here it is known that the plaintiff was prepared to be dishonest for his financial advantage. In my view that permeates every aspect of the case."

[26] It is, in my view, appropriate to take a course whereby one assesses the likelihood of whether a plaintiff will have been honest with a physician who has been engaged to review his physical status by reference to his overall credibility. There were a substantial number of documents tendered relating to Centrelink's and Mission Australia's involvement with the plaintiff. Mr Mellick, counsel for the defendant, referred to the plaintiff as having an "entitlement mentality". That has been established to my satisfaction by the material which has been tendered. The plaintiff was a particularly unimpressive witness in all respects. I have taken into account the fact that he has had a limited education and may not have been able to express

himself as well as others. There is, though, substantial evidence to demonstrate that his approach to those seeking to assist him to obtain employment has been deceitful. I do not accept that he was honest when he was describing his symptoms to medical practitioners. He could not explain how he could attend the gymnasium and exercise frequently and yet still have the pain and incapacity of which he complained.

[27] In coming to a conclusion about the plaintiff's physical status as a result of the injury, I prefer the evidence of Dr Labrom. The plaintiff appears to have been less extravagant in his untruths with Dr Labrom than with Dr Campbell. Dr Labrom was of the opinion that the plaintiff has a residual amount of low back pain and irritation from a torn disc at the L5/S1 level and a small degree of posterior thigh pain without any neurological weakness. He rated his permanent impairment of the whole person at 5 per cent. Dr Labrom's view was that the plaintiff could continue working but would caution against lifting heavy objects and that he should avoid twisting in confined spaces. He said that there would be no need for any formal regime of treatment, he requires no surgery or steroid injection intervention. The plaintiff, he said, was very physically fit. Finally, his opinion was that the plaintiff would be likely to be able to function at a reasonably high physical level in his current form and would be able to participate in a food processing line activity as long as he was cautious with respect to twisting and lifting.

Assessment of damages

[28] In his statement of loss and damage the plaintiff concedes income from Centrelink from 2005 through to the commencement of employment with the defendant in October 2007. For the period from 1998 to 2004 he says that he received income of $400 to $600 net per week as a security guard. There were no records to support that assertion because that assertion was not true. Benefits were paid to the plaintiff from 2001 through to 2008 and his taxable income for the 2005 to 2008 financial years is set out in those documents. He disclosed earnings from employment for the 17 months from May 1999 of $3,188. In the nine years contained in the Centrelink records the plaintiff's disclosed earnings from employment were on average in the order of $6.50 per week.

[29] In order for the plaintiff to demonstrate an entitlement to damages for loss of earning capacity, he must show that his earning capacity has been diminished by reason of the injury and that the diminution of earning capacity was or might be productive of financial loss.[1]

[30] The evidence which I have accepted demonstrates that he is capable of earning much more than he has in the past. It follows from that and from dr Labrom's evidence that the plaintiff has failed to demonstrate that he has suffered a loss of any earning capacity as a result of the injury or that it has been productive of any financial loss.

[31] There was no evidence provided to demonstrate that the plaintiff was, at any time, what might be regarded as a good employee. Perhaps that is not surprising given the circumstances in which his licence as a security guard was suspended.

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1 *Nichols v Curtis & Anor* [2010] QCA 303 at [14].

[32] The impairment which the plaintiff has suffered as a result of the injury can only be described as modest. I do not accept that he has suffered any loss in a financial sense.

[33] I assess his damages as follows:

(a)	General Damages for pain and suffering			$5,000.00
(b)	Interest on $10,000 at 2% per annum for 2.5 years			$250.00
(c)	Special damages			
	(i)	Medicare	$1,325.10	
	(ii)	WorkCover	$4,751.31	
	(iii)	Medication and travel	$1,000.00	$7,076.41
(d)	Interest on $1,000 at 5% for 2.5 years			$125.00
(e)	Future or recurring expenses			0.00
(f)	Past economic loss – not more than WorkCover net benefits			$7,930.02
(g)	Interest (taking account of benefits and Centrelink benefits)			0.00
(h)	Past Superannuation at 9%			$713.70
(i)	Future economic loss			0.00
(j)	Future Superannuation			0.00
(k)	**Gross damages**			**$21,095.13**

[34] The parties are agreed that, on the basis of the above assessment and after taking into account the appropriate refunds, there should be judgment for the plaintiff in the sum of $7,384.80.